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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1128

MAURY D. DICKS, et al.,
Petitioners,

v.

FRED NAFF, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Arkansas in this case has now been reported as **Dicks v. Naff**, 255 Ark. 357, 500 S.W. 2d 350 (1973).

QUESTIONS PRESENTED

The Points presented by Petitioners under the heading Questions Presented and the Points presented under the heading Arguments for the Allowance of the Writ do not coincide. Respondents will respond to the Points presented under Argu-

ments for the Allowance of the Writ and to Point III presented under the Questions Presented (as this Point III is not presented except under Questions Presented).

CONSTITUTIONAL PROVISION INVOLVED

In addition to the statutory and ordinance provisions presented in Petitioners' brief, this case also involves the following portion of Amendment No. 7 to the Arkansas Constitution, 1 Ark. Stat. Ann. 205 (1947):

Local Petitions

Municipalities and Counties—The initiative and referendum powers of the people are hereby further reserved to the local voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties, but no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith.

Municipalities may provide for the exercise of the initiative and referendum as to their local legislation.

General laws shall be enacted providing for the exercise of the initiative and referendum as to counties. Fifteen per cent of the legal voters of any muncipality or county may order the referendum, or invoke the initiative upon any local measures. In municipalities the number of signatures required upon any petition shall be computed upon the total vote cast for the office of mayor at the last preceding general election; in counties, upon the office of Circuit Clerk. In municipalities and counties the time for filing an initiative petition shall not be fixed at

less than sixty days nor more than ninety days before the election at which it is to be voted upon; for a referendum petition at not less than thirty days nor more than ninety days after the passage of such measure by a municipal council; nor less than ninety days when filed against a local or special measure passed by the General Assembly.

STATEMENT OF THE CASE

Respondents concur in most of the statements contained in Petitioners' Statement of the Case. However, Petitioners' statement (Petition, p. 5) that the challenged tax was levied on them or on their businesses is inaccurate. The tax actually is a tax on their customers, its manner of collection being to collect an additional 1% of the basic amount of all bills for food and lodging.

Petitioners also state that the stipulations of fact and testimony below "clearly establish that there is indeed another class of businesses in Eureka Springs, Arkansas, other than hotels, motels and restaurants, which is not subject to the tax, but which bears the same or similar relationship, if not identical, to the tourist trade as do hotels, motels and restaurants" (Petition, pp. 5-6). This is not a statement of "facts material to the consideration of the questions presented" as required by Rule 23 of this Court's Rules. It is a conclusion which was rejected by the trial court and the Supreme Court of Arkansas.

The facts, as stipulated below, that Petitioners fail to point out are as follows:

(1) All or nearly all of the gross receipts of hotels, motels, restaurants, cafes, and cafeterias (the types of businesses whose gross receipts are subject to the challenged tax) located in Eureka Springs, Arkansas, are derived from tourist trade.

(2) There are 32 hotels and motels in Eureka Springs which derive 97.5% of their gross receipts from tourist trade, and there are 25 restaurants, cafes, and cafeterias in Eureka Springs which derive 90% of their gross receipts from tourist trade.

(3) There is another class of businesses in Eureka Springs which derive nearly all, but a lesser percentage than hotels, motels, restaurants, cafes, and cafeterias, of their gross receipts from tourist trade.

(4) Included within this other class are two campgrounds, three antique shops, and one museum which derive, respectively, 100%, 90%, and 90% of their gross receipts from tourist trade. All other sub-classes within this class derive a lesser percentage of their gross receipts from tourist trade.

Petitioners offered no evidence as to the relative amounts of gross receipts derived by the various types of businesses from tourist trade.

ARGUMENTS FOR DENIAL OF THE WRIT

POINT I

Petitioners discuss the purpose of the challenged legislation as if the legislative bodies which enacted it were conducting some sort of personalized legal harassment against them or possessed some sinister and illegal motive. They have gone to great lengths to convince the Court that it must look to the real rather than some contrived purpose. They do not tell this Court what they would have it hold the purpose of the legislation to be, but they did tell the Supreme Court of Arkansas that the purpose of the legislation "is the promotion of tourism."

The Supreme Court of Arkansas accepted this contention when it said "[w]e hold that whether the object or purpose of the act and implementing ordinance was merely for raising revenue or its object or purpose was to spend money to promote tourism as earmarked by the act, in either event, the appellants have not discharged the heavy burden of proof which they must shoulder to demonstrate the enabling act and implementing ordinance have no rational basis and are not reasonably related to the purpose of the legislation" (Petition, p. a-7).

Petitioners attempt to make it appear that the Supreme Court of Arkansas relied entirely on the holding of **New York Rapid Transit Corp. v. New York,** 303 U.S. 573 (1938) and the rule there stated that the purpose of a taxing ordinance is to raise revenue (Petition, p. 14). As the above language shows, this is not true.

Petitioners state (Petition, p. 14) that the proper question is whether "this underinclusiveness or difference in treatment is based upon some reasonable, permissible ground, itself hav-

ing some relation to the object of the legislation." The Supreme Court of Arkansas specifically held that such a ground existed (Petition, p. a-7):

> As previously observed, the legislature could logically and practically envision that appellants, as a classification, would be the beneficiary of not only as great or greater percentage of the tourist dollar (as stipulated)—they also would benefit from much greater gross receipts and profits than the untaxed businesses which also derive a benefit from the sojourner or tourist.

Petitioners now quarrel with the only logical conclusions to be drawn from the very facts to which they stipulated.

Respondents themselves shouldered the burden of proving what it was Petitioners burden to disprove in regard to another ground of difference which supports the classification. At the trial expert testimony was offered to show that approximately 96% of all tourist dollars spent in Eureka Springs other than for travel are spent for food and lodging, and that nearly all of these expenditures are made in hotels-motels and restaurants.

Thus, by limiting the class of businesses whose gross receipts are subject to the challenged tax, the Legislature and City Council have taxed nearly all expenditures made by tourists in Eureka Springs, and tourism is being promoted with tourists' dollars. This evidence was later excluded by the trial court and was not considered by it or the Supreme Court of Arkansas because it was unnecessary. It is, however, clearly admissible and serves to show that no matter how light this Court might make the burden of proof in a case such as this Petitioners cannot prevail, for it would be impossible for them to disprove that this state of facts exists. In fact, even if the Court places the burden on Respondents to prove the existence of some ground of difference between the businesses whose gross receipts are taxed and those whose gross receipts are not taxed that

bears a reasonable relationship to the object of promoting tourism, Respondents have already met that burden and could do so again upon remand.

Petitioners' discussion of hypothetical cases is inapposite to this case. They state that, in regard to taxes, "in many instances raising money is purely incidental" (Petition, p. 14), yet they do not deny that the revenues raised by the challenged tax are essential to the fulfillment of the admitted purpose for which they are earmarked. They state that the "actual purpose of a statute may be regulation through taxation" (Petition, p. 14), yet they do not assert that such a purpose lies behind the challenged tax. They state that a "tax may be a sort of tariff to encourage one business or discourage another" (Petition, p. 14), yet no allegation is made that such a purpose is involved in this case. And in spite of Petitioners' concern about whether the courts look for the actual and real purposes as opposed to conceivable purposes in equal protection cases, the Supreme Court of Arkansas accepted as the purpose of the challenged tax the only purpose advanced by Petitioners, the promotion of tourism. Petitioners state that "[t]he Court should recognize the obvious purpose of a statute and should not try to credit the legislature with a more permissible motive" (Petition, p. 13). But Petitioners present no additional "real" purpose which the Supreme Court of Arkansas failed to consider, nor do they claim that it "conceived" other purposes that should not have been considered.

Petitioners also quarrel with the long and well established rule that the party challenging the constitutionality of a law must negative every state of facts that can reasonably be conceived to sustain it. In the absence of an express declaration of the factual basis for a legislative classification in the statute itself or within its legislative history, any state of facts which is presented as a basis for a classification is speculative to at least some degree. In this case Petitioners have conceived of

one factual basis upon which the legislative bodies **could** have grounded the classification and have attempted to disprove it (unsuccessfully in the eyes of both courts below). They have adamantly refused to recognize that there may be other factual bases that are equally or even more reasonable and which merit consideration. In effect, they assert that they have the privilege of speculating as to what the factual basis for the classification is but that Respondents do not.

In this case Petitioners had no problem of rebutting a state of facts before it was conceived, as they imply (Petition, p. 16), for several factual bases which serve to justify the classification were presented to the trial court but ignored by Petitioners. No new bases to sustain the classification were offered by either court below. Petitioners now complain that the law should be modified to insure that **all** plaintiffs have the chance they had to disprove the factual bases for a classification (Petition, p. 16).

Petitioners have engaged in an abstract discussion of several long and well established rules of law, which discussion has no bearing on this case. If all of Petitioners' arguments as to what the law should be are accepted, they still cannot prevail. Their problems in supporting their positions lie not with the law but with the facts.

Another and sufficient reason for denying the Petition is that this case does not have enough general importance to warrant the Court's attention. From June 1, 1972 to December 1, 1972, the City of Eureka Springs collected $14,768.13 pursuant to the tax. And even if the challenged tax in this case were to be held invalid, it would be because of the peculiar fact situation that is present in Eureka Springs. Eureka Springs had a population of 1,670 in 1970. Economically, it is dependent on tourism to a far greater extent than any other city in Arkansas as was brought out during the trial, or at least any other city in Arkansas that has enacted a tax pursuant to the

challenged state statute. The other cities which have done so and their populations as of the 1970 census are Little Rock, 132,483, Hot Springs, 35,631, Jonesboro, 27,050 and Texarkana, 21,682. Conditions in these cities obviously will differ substantially from the conditions in Eureka Springs which Petitioners claim support their contentions. In fact, no city in Arkansas is comparable to Eureka Springs as a tourist attraction or in its economic dependence on tourism. If this Court is to re-evaluate equal protection requirements in tax cases it could hardly choose a worse case in which to do so.

POINT II

Petitioners complain that they were denied standing to challenge the constitutionality of the provision in the enabling act for referring an implementing ordinance to the voters upon petition of 500 electors. Yet they ignore the holding that the election proviso, even if unconstitutional, is severable. The Supreme Court of Arkansas made the following statement (Petition, p. a-8):

> We hold that the provision requiring 500 petitioners is severable . . . [T]he legislature, in plain and explicit language in a severability clause, provided that any portion of the act was severable to insure its validity.

This holding is on a matter of state law and not subject to challenge here. Therefore the remainder of the enabling act would be unaffected by a holding that the election proviso is unconstitutional and arguments regarding it are now moot.

The Supreme Court of Arkansas acted properly in recognizing that Petitioners' argument regarding the election proviso was premised upon an incorrect statement of fact, namely that the election proviso (which requires 500 signatures) was Petition-

ers' only available election remedy (Petition, p. 12). The Court considered the whole scheme of applicable state laws, including Amendment No. 7 to the Arkansas Constitution which requires the signatures of only 15% of the qualified electors of any Arkansas municipality to refer any ordinance to a referendum election (or to initiate at any general election a repealing measure). This action by the Court was correct, for obvious reasons. See, *e.g.*, **Two Guys from Harrison-Allentown v. McGinley,** 366 U.S. 582 (1961), reh. den. 368 U.S. 869.

The Supreme Court of Arkansas observed that Petitioners would have had to obtain only approximately 125 signatures on a petition to refer the implementing ordinance to the voters for approval. Even now they may, by obtaining approximately the same number of signatures on a petition, submit to the voters of Eureka Springs in the upcoming 1974 election an ordinance repealing the implementing ordinance by means of an initiated measure.

POINT III

The Supreme Court of Arkansas did not consider any facts other than those supported by evidence properly before the Court and those of which it properly took judicial notice in reaching its decision in this case.

CONCLUSION

The decision of the Supreme Court of Arkansas is correct; it is in accord with the applicable decisions of this Court and the questions Petitioners seek to present here are insubstantial, moot, and/or unnecessary to decide. The Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully submitted

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